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No. 88-42

Supreme Court, U.S.
FILED
JUN 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

OLAF A. HALLSTROM AND MARY E. HALLSTROM,
PETITIONERS

v.

TILLAMOOK COUNTY, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether petitioners' action to enforce standards created under the Resource Conservation and Recovery Act of 1976 must be dismissed because petitioners did not give the Administrator of the Environmental Protection Agency notice of this action 60 days before it was filed, as required by 42 U.S.C. 6972(b)(1).

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INTEREST OF THE UNITED STATES

This case arises under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901-6987 (1982 & Supp. IV 1986), which was enacted to regulate the disposal of solid wastes and to promote the protection of health and the environment. See 42 U.S.C. 6901-6902 (1982 & Supp. IV 1986). Petitioners filed this action under Section 7002(a)(1)(A) of RCRA, 42 U.S.C. 6972(a)(1)(A) (Supp. IV 1986), which allows private persons to bring actions to enforce the standards and requirements of the Act. Congress has authorized such private actions to supplement the federal government's enforcement of the statute.[1] See *Gwaltney of Smithfield* v. *Chesapeake Bay*

[1] RCRA, for example, authorizes the Administrator of the Environmental Protection Agency to issue administrative orders assessing civil penalties and requiring compliance with the Act. The United States may commence civil actions for injunctive relief and civil penalties of up to $25,000 per day. 42 U.S.C. 6928(a) (1982 & Supp. IV 1986). And criminal sanctions may be imposed for certain violations. 42 U.S.C. 6928(d) (1982 & Supp. IV 1986).

Foundation, Inc., 108 S. Ct. 376, 383 (1987). RCRA's citizen-suit provision states that no such action "may be commenced * * * prior to sixty days after the plaintiff has given notice of the violation to * * * the Administrator [of the Environmental Protection Agency]; the State in which the alleged violation occurs; and to any alleged violator * * *." 42 U.S.C. 6972(b)(1) (1982 & Supp. IV 1986). Similar notice requirements are found in the citizen-suit provisions of at least 18 other federal statutes.[2] The United States' interest in this case is to maintain the balance created by Congress—as defined by the notice requirement—between government enforcement and private court actions.

STATEMENT

1. Petitioners own a dairy farm located next to the Tillamook County landfill in Tillamook County, Oregon (Pet. App. 2a). On April 20, 1981, petitioners mailed formal notice to the County of their intent to bring an action to compel the County's compliance with landfill requirements of RCRA (Pet. 4). Petitioners, however, did not notify the Administrator of the Environmental Protection Agency, nor the Oregon Department of Environmental Quality (DEQ), of their intent to sue (Pet. App. 2a).

On April 9, 1982, petitioners filed this action against the County under the citizen-suit provision of RCRA, 42 U.S.C. 6972(a)(1). Petitioners alleged that leachate discharged from the landfill caused bacterial and chemical pollution of the surface and ground water within their property (Pet. App. 2a). Petitioners also set forth state-law claims for inverse condemnation, trespass, and nuisance (*ibid.*).

[2] The relevant portions of the citizen-suit provisions of those statutes are reprinted in Appendix B to the amicus curiae brief filed by five environmental groups in support of petitioners.

On March 1, 1983, Tillamook County moved for summary judgment on the ground that petitioners had failed to comply with the notice requirement of Section 7002(b)(1)(A). On March 2, 1983, petitioners sent a copy of their original notice of intent to sue to the Administrator of EPA and the DEQ. Petitioners informed those governmental agencies that they intended to refile their action if the court dismissed their case (Pet. App. 19a).

2. On April 22, 1983, the district court denied the County's motion for summary judgment. It ruled that petitioners had cured any defect in notice by notifying the Administrator and the DEQ on March 2, 1983 (Pet. App. 19a). The court stated that the purpose of the notice provision in Section 7002(b)(1)(A) was to give the administrative agencies the chance to bring their own enforcement actions (Pet. App. 19a). Here, the court observed, EPA and the DEQ had expressed no interest in bringing an action. The district court concluded, therefore, that "[t]o grant defendant's motion based on the notice provision would be a waste of judicial resources" (*ibid.*).

Following a trial in July 1985, the district court held that the County's landfill violated RCRA requirements. The court ordered the County to remedy the violation within two years (Pet. App. 2a). A jury, however, found in favor of the County on all three state-law claims (*ibid.*). The district court later denied petitioners' request for an award of attorneys' fees and expert fees.

3. On November 3, 1987, a divided panel of the court of appeals vacated the judgment and remanded the case to the district court to be dismissed. The court ruled that the 60-day notice requirement in Section 7002(b)(1)(A) is a jurisdictional prerequisite to bringing a private suit under RCRA (Pet. App. 6a). The court explicitly agreed with the First Circuit in *Garcia* v. *Cecos International, Inc.*, 761 F.2d 76, 79 (1985), that "the plain language of [§ 7002(b)

(1)(A) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language' " (Pet. App. 4a). The court of appeals found the plain language to be supported by the provision's purpose "of encouraging non-judicial resolution of environmental conflicts" (*id.* at 4a-5a).[3]

SUMMARY OF ARGUMENT

1. Section 7002(b)(1)(A) of RCRA states that "[n]o action may be commenced under" the citizen-suit provision of RCRA until "60 days after the plaintiff has given notice" to EPA, the State, and the alleged violator. Under the Federal Rules of Civil Procedure, an action is commenced by filing a complaint with the court. Hence, the meaning of Section 7002(b)(1)(A) is clear: a private plaintiff may not file a complaint alleging a RCRA violation until 60 days after he gives the required notice. Here, petitioners did not give the required prior notice; thus, the court of appeals correctly held that this action must be dismissed for lack of jurisdiction.

Petitioners argue that a private action may be commenced without notice so long as the court does not act until 60 days after the government has been notified. That suggested procedure is inconsistent with the plain terms of the statute. An action that is stayed pending proper notice was nevertheless commenced prior to the notice period and is thus prohibited by Section 7002(b)(1).

2. The legislative history of Section 7002(b) confirms that Congress intended for prior notice to be a prerequisite

[3] The court of appeals amended its opinion on April 7, 1988, to make it clear that, because the district court lacked jurisdiction over petitioners' federal-law claim, it lacked pendent jurisdiction over the state-law claims as well (Pet. App. 14a-15a).

to a plaintiff's commencing a suit. There is much evidence that Congress was well aware of the mandatory nature of prior notice. And there is no hint that Congress wished to give a court the discretion to disregard that clear requirement in a particular case.

The 60-day notice period gives enforcement agencies an opportunity to act on the alleged violation and it gives the alleged violator a chance to bring itself into compliance with the law. Those dual purposes could be frustrated by petitioners' suggestion that a plaintiff may file a complaint so long as the district court takes no action until the government has been on notice for 60 days. Once a suit is filed, positions become hardened and cooperation is less likely. Accordingly, this Court should follow the plain terms of Section 7002(b) and hold that petitioners' action is barred because it was commenced without prior notice to the government.

ARGUMENT

THIS ACTION MUST BE DISMISSED BECAUSE PETITIONERS DID NOT GIVE THE GOVERNMENT PRIOR NOTICE AS REQUIRED BY SECTION 7002(b)(1)(A)

A. The Court of Appeals' Decision Follows From The Plain Language of the Statute

1. It is well settled that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation, Inc.*, 108 S. Ct. at 381; *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 108.

Here, Section 7002(b)(1)(A) of RCRA states that "[n]o action may be commenced under" Section 7002(a)(1)(A) until "60 days after the plaintiff has given notice" to EPA, the State, and the alleged violator.[4] Rule 3 of the Federal Rules of Civil Procedure, in turn, defines when an action is "commenced"; it provides that "[a] civil action is commenced by filing a complaint with the court." Section 7002(b)(1)(A) of RCRA is thus "uncomplicated." *North Dakota* v. *United States*, 460 U.S. at 312. It creates a clear and easy-to-follow rule. A private plaintiff may not file a complaint alleging a RCRA violation until 60 days after he gives the required notice. See *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 79-82 (RCRA's notice requirement is "unambiguous"); *Walls* v. *Waste Resource Corp.*, 761 F.2d 311, 316-317 (6th Cir. 1985) (same); see also *City of Highland Park* v. *Train*, 519 F.2d 681, 691 (7th Cir. 1975) ("language chosen by Congress makes it clear that the Administrator is to be given notice in addition to that required by Rule 12(a), Fed. R. Civ. P., which allows him sixty days to answer or move against a complaint by which an action is commenced"), cert. denied, 424 U.S. 927 (1976).

Congress allows certain private actions to be commenced under federal environmental laws without prior notice to the government. For example, a private action under RCRA may be brought "immediately" to remedy alleged violations concerning the treatment, storage, or disposal of hazardous wastes. See 42 U.S.C. 6972(b)(1)(A) (1982 & Supp. IV 1986).[5] Similarly, Congress allows pri-

[4] This case does not present a question concerning the adequacy of such notice. All the parties agree that the Administrator of EPA was not notified until after this case was commenced. See Pet. App. 19a.

[5] RCRA defines "hazardous waste" as "solid waste" which may "cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness," or which may "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. 6903(5). Petitioners have made no allegations concerning hazardous waste in this case.

vate actions under the Federal Water Pollution Control Act (Clean Water Act) to be brought immediately in cases involving violations of "toxic pollutant * * * effluent limitation[s]." See 33 U.S.C. 1365(b) and 1317(a).[6] Thus Congress has carefully chosen which type of actions may—and which type may not—be commenced without prior notice to the government. This demonstrates that "[t]he notice requirement is not a technical wrinkle or superfluous formality." *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 79.

Petitioners argue (Br. 26-30, 38-39) that a private action under Section 7002(a)(1) may be commenced without prior notice so long as the court does not act until 60 days after the government has been notified. Although one court of appeals adopted that approach (erroneously in our view) in applying a similar provision in the Clean Water Act,[7]

[6] There are other examples. The Clean Air Amendments of 1970, 42 U.S.C. 7604(b), authorizes immediate citizen suits involving stationary-source emission standards and certain compliance orders. The Endangered Species Act of 1973, 16 U.S.C. 1540(g)(2)(C), allows immediate private actions relating to the listing of threatened and endangered species where there is "an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants." The Outer Continental Shelf Lands Act, 43 U.S.C. 1349(a)(3), authorizes an immediate suit where the alleged violation "constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff."

[7] See *Pymatuning Water Shed Citizens for a Hygienic Environment* v. *Eaton*, 644 F.2d 995, 996 (3d Cir. 1981); accord *Proffitt* v. *Commissioners, Township of Bristol*, 754 F.2d 504 (3d Cir. 1985). Contrary to the briefs of petitioners and amici (Pet. Br. 24; Amici Br. 11), the Second, Eighth, and District of Columbia Circuits have not

that suggested procedure is flatly inconsistent with Section 7002(b)(1). An action that is stayed pending proper notification was nevertheless "commenced" "prior to 60 days after the plaintiff [gave] notice of the violation" to the required persons. § 7002(b)(1), 42 U.S.C. 6972(b)(1) (1982 & Supp. IV 1986). And such an action, by the plain terms of Section 7002(b)(1), is "prohibited." 42 U.S.C. 6972(b)(1) (1982 & Supp. IV 1986). The only remedy that is consistent with the language of the statute is to bring the improperly commenced action to an end—*i.e.*, to dismiss it for lack of jurisdiction. An order of dismissal cleans the slate and the plaintiff may commence a new action if and when he complies with the notice provision. "To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language.' " Pet. App. 4a, quoting *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 78. Accord *Save the Yaak Committee* v. *Block*, 840 F.2d 714, 721 (9th Cir. 1988).

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adopted the so-called "pragmatic" approach followed by the Third Circuit. The courts in *NRDC* v. *Callaway*, 524 F.2d 79, 83 (2d Cir. 1975), and *NRDC* v. *Train*, 510 F.2d 692, 703 (D.C. Cir. 1974), permitted those suits to proceed in the absence of prior notice because the plaintiffs stated claims under the Administrative Procedure Act, which does not require prior notice. In *Friends of the Earth* v. *Carey*, 535 F.2d 165, 175 (2d Cir. 1976), cert. denied, 434 U.S. 902 (1977), the Second Circuit addressed only whether notice to one agency constituted notice to a sister agency, not whether the 60-day notice requirement must be met. In *Hempstead County & Nevada County Project* v. *EPA*, 700 F.2d 459, 463 (1983), the Eighth Circuit transferred an action brought under RCRA to the district court after it held that it lacked jurisdiction over the plaintiffs' claim. The court stated that the notice provision in Section 7002 had been satisfied (700 F.2d at 463) so that the plaintiffs' action could properly be commenced in the district court. Finally, the Eighth Circuit in *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303 (1976), without analysis, permitted that action to proceed without notice because of a "unique evidentiary situation" but stated that its decision could "not be cited as authority for future disregard of the notice requirement."

2. Petitioners state (Br. 13) that Section 7002(b)(1) "does not speak in jurisdictional terms or refer to the jurisdiction of the court." That is not correct if petitioners are suggesting that the district court had jurisdicion to adjudicate the claim in this case. Section 7002(b)(1) defines in precise terms when a private person may commence an action under RCRA—*i.e.*, only after he has given the proper notice and waited 60 days. That language may not be disregarded at the discretion of a district court simply because Congress did not use the word "jurisdiction" in the Section. See, *e.g.*, *Teague* v. *Regional Comm'r of Customs, Region II*, 394 U.S. 977 (1969) (time limits in 28 U.S.C. 2101 for taking cases to the Supreme Court are jurisdictional even though the statute does not use the word "jurisdiction").

Indeed, Congress's use of the word "jurisdiction" in Section 7002(b)(1) would have been inconsistent with the structure of the statute. Congress used the word "jurisdiction" in Section 7002(a) to designate the courts that are competent to hear citizen claims under RCRA. That Section provides that an action "shall be brought in the district court for the district in which the alleged violation occurred [and] the district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties." 42 U.S.C. 6972(a) (1982 & Supp. IV 1986). There is no doubt that the district court in this case was competent to hear petitioners' claim—*i.e.*, that it would have had jurisdiction over a valid cause of action commenced after proper notice. The question is whether the district court was required to dismiss petitioners' action when the County raised the issue of lack of notice. Section 7002(b)(1) answers that question by stating that an action is "prohibited" if it is "commenced" "prior to sixty days after the plaintiff has given notice of the violation" to the Administrator of EPA. Accordingly, the district court was without jurisdiction to proceed further when it learned that

petitioners failed to give the required notice before they commenced this action.

Petitioners' reliance (Br. 22, 34) on *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), is also misplaced. In that case, this Court considered Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), which requires that a claimant file with the Equal Opportunity Employment Commission (EEOC) a claim within 180 days after the alleged unlawful employment practice occurred. The Court ruled that the filing deadline is in the nature of a statute of limitations and is subject to "waiver as well as tolling when equity so requires." 455 U.S. at 398. Contrary to petitioners' suggestion, however, this Court did not hold that the filing requirement in Section 706(e) may be disregarded at the discretion of a court. Indeed, the Court recently affirmed a judgment dismissing a Title VII action where the plaintiffs failed to make a timely filing with the EEOC. *Lorance* v. *AT&T Technologies, Inc.*, No. 87-1428 (June 12, 1989). Thus, *Zipes* provides no authority for the proposition that a court may ignore the plain meaning of Section 7002(b)(1)(A) of RCRA.

B. The Decision Below Is Consistent With The History And Purpose Of The Notice Requirement

As the language of the statute is clear, there is no need to repair to secondary materials for evidence of Congress's intent. See, *e.g.*, *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989); *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). Nevertheless, to the extent that such materials may be relevant when the statute itself speaks with such clarity, see *Burlington Northern Railroad*, 481 U.S. at 461-464, the legislative history demonstrates that the provision at issue is no drafting error, that "the result it apparently decrees is [not] difficult to fathom or * * * inconsistent with Congress' intention" (*Public Citizen* v. *Department of Justice*, No. 88-429 (June 21, 1989), slip op. 13), and that the statute, indeed, means what it says.

Until 1970, federal environmental statutes were enforceable only by the government. See, *e.g.*, Clean Air Act of 1963, Pub. L. No. 88-206, § 5, 77 Stat. 396. Congress first gave private parties the right to bring enforcement actions in Section 304(a) of the Clean Air Amendments of 1970, which allowed private suits to enforce emission standards established under that Act. See 42 U.S.C. 7604(a). The Clean Air Act's notice requirement has been the model for the citizen-suit notice provisions in RCRA and other statutes. See *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 81. Its history is therefore helpful in understanding the intent of Congress in this case.

The legislative history of Section 304(a) confirms that Congress intended for notice to be a prerequisite to a plaintiff's commencing a suit. The Senate Committee Report explaining Section 304(a) stated that the "Committee has provided a period of time after notice *before a citizen may file an action* * * * [to] give the administrative enforcement office an opportunity to act on the alleged violation." S. Rep. No. 1196, 91st Cong., 2d Sess. 37 (1970) (emphasis added). The Senate Report continued: "[T]o further encourage and provide for agency enforcement, the Committee has added a requirement that *prior to filing* a petition with the court, a citizen or group of citizens would first have to serve notice of intent *to file such action* * * *." *Ibid.* (emphasis added).[8]

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[8] The Senate Committee on Public Works initially drafted the Clean Air Act's citizen-suit provision, which required a 30-day notice period. The companion bill that passed the House did not authorize citizen suits. The conference committee adopted the Senate version, but extended the notice period to 60 days. See Staff of Senate Comm. on Public Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970*, at 205-206 (Comm. Print 1974). The full Congress then adopted the conference provision and required, in language identical to Section 7002(b)(1)(A) of RCRA, that "[n]o action may be commenced * * * prior to 60 days after the plaintiff has

Senator Muskie, the sponsor of the citizen-suit provision, stated on the floor that "before any citizen *can bring an action,* he is required to notify the enforcement agency concerned of his intent to do so, and the specific, alleged violation which he has in mind." 116 Cong. Rec. 33,103 (1970) (emphasis added), *reprinted in* Staff of Senate Comm. on Public Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970,* at 353 (Comm. Print 1974). Likewise, the conference report stated that "*[p]rior to commencing any action in the district courts,* the plaintiff must have provided the violator, the Administrator and the State with sixty days notice." *Id.* at 206 (emphasis added). Accordingly, the intent of the Congress that passed Section 304(a) of the Clean Air Amendments of 1970 could not have been clearer: a plaintiff must provide the required notice before he files his court action.

The legislative history of RCRA's identical notice provision displays the same unambiguous intent. The House Report accompanying Section 7002(b) when it was adopted in 1976 stated that the notice requirement "prohibits any person *from commencing any action* under this section unless * * * 60 days have elapsed after the plaintiff has given notice of the violation * * *." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 69 (1976) (emphasis added). Thus, Congress plainly intended that notice be given 60 days prior to filing a complaint. There is no hint that Congress wished to allow a court to disregard that clear requirement whenever a court believes, as the district court did here, that to insist on prior notice "would be a waste of judicial resources" (Pet. App. 19a).

Petitioners correctly note (Br. 16-17) that Congress has passed citizen-suit provisions to authorize and encourage

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given notice of the violation" to EPA, the relevant State, and the violator. 42 U.S.C. 7604(b)(1)(A) (1982 & Supp. IV 1986).

private participation in the enforcement of federal environmental statutes. See S. Rep. No. 1196, 91st Cong., 2d Sess. 36-37 (1970) (report of Public Works Committee on the Clean Air Amendments of 1970). Private citizens can perform a "public service" by uncovering violations and by "motivat[ing] governmental agencies charged with the responsibility to bring enforcement and abatement proceedings." *Id.* at 37, 38. A citizen suit, however, "is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation,* 108 S. Ct. at 383. Congress intended that " 'the great volume of enforcement actions [ ] be brought by [the government]', and that citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.' " *Ibid.,* quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64 (1971) (discussing citizen-suit provision of Clean Water Act). See also § 7002(b)(2) of RCRA, 42 U.S.C. 6972(b)(2) (1982 & Supp. IV 1986) (prohibiting private enforcement actions if the government is already prosecuting such an action).

Accordingly, the 60-day notice period has two recognized purposes. First, it gives enforcement agencies "an opportunity to act on the alleged violation." S. Rep. No. 1196, *supra,* at 37. Second, as this Court observed in *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation, Inc., supra,* prior notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." 108 S. Ct. at 382-383. Both of those purposes would be frustrated by petitioners' suggested rule—*i.e.,* a plaintiff may file a complaint so long as the district court takes no action until the government has been on notice for 60 days. The court of appeals below aptly recognized that "once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that co-

operation and compromise [are] less likely" (Pet. App. 5a). See also *Hearings on S. 3229, S. 3466 and S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 91st Cong., 2d Sess. 1570 (1970). Moreover, while a suit is pending a defendant is very unlikely to admit liability and agree to remedy a violation. To do so would be to subject the defendant to the possibility of attorney's fees and civil fines. See 42 U.S.C. 6928. Thus, "far from being a mere formality, prior notice was viewed by Congress as crucial in defining the proper role of the citizen suit." *Walls* v. *Waste Resource Corp.*, 761 F.2d at 317.

Petitioners' amici contend that the court of appeals' decision will "hinder" and "create a rigid barrier to" citizen suits (Amicus Br. 12, 9). That contention is unpersuasive. Section 7002(b)(1) sets forth a simple rule; it requires prior notice to three specified persons. If the plaintiff fails to give prior notice, his action must be dismissed until he complies with the notice requirement. After proper notice is given and 60 days elapse, the plaintiff may file a new action. The clarity and predictability of applying the statute in accordance with its plain terms stand in sharp contrast to amici's litigation-generating proposal for case-by-case determinations of whether the plaintiffs have provided "sufficient notice" to allow enforcement agencies "adequate opportunity" to investigate and to act (Amicus Br. 19). For an overburdened judicial system, amici's approach, apart from being inconsistent with the statute, has little to commend it.

Finally, petitioners' amici argue (Amicus Br. 3) that the court of appeals' decision will prevent federal courts "from providing essential temporary injunctive relief in cases when notice would otherwise be waived or excused." Amici's argument, of course, assumes that public agencies directed to enforce the environmental statutes will fail to

meet their responsibilities during the notice period. There is no basis for that assumption. In any event, the argument is misdirected; it is the responsibility of Congress to amend the relevant statutes if it believes that the environment faces irreversible harm during the notice period. Congress is richly experienced in drafting statutes that authorize citizen suits without prior notice. See pp. 6-7, *supra*. Congress has decided that petitioners' type of action is not such a suit. That determination warrants the judiciary's respect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00317